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No. 87-1472

In The

Supreme Court of the United States

October Term, 1987

OWENS-ILLINOIS, INC., *et al.*,

Petitioners,

vs.

BRUCE E. DANFIELD, *et ux.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICUS CURIAE WILENTZ, GOLDMAN & SPITZER, P.C. IN OPPOSITION

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QUESTION PRESENTED

Whether the majority opinions of the Third Circuit upholding the New Jersey Supreme Court's denial of the state-of-the-art defense to manufacturers of asbestos-containing products: (a) err in holding that such a rule of law does not deny equal protection of the laws; (b) err in permitting preclusion of evidence in denial of due process or the taking of judicial notice in violation of Federal Rule of Evidence 201; or (c) represent a conflict with decisions of either this Court or the Fifth Circuit.

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INTEREST OF AMICUS CURIAE

Amicus curiae, Wilentz, Goldman & Spitzer, is a professional corporation, engaged in the practice of law at Woodbridge, New Jersey and is counsel in approximately 1,000 presently pending cases in the federal and state courts of New Jersey, representing

plaintiffs suing manufacturers and distributors of asbestos and asbestos containing products for physical injury, illness, and in some instances death, resulting from unwarned exposure to such products. It is in the interest of all such plaintiffs that the writ of certiorari petitioned for herein be denied as this would leave undisturbed the substantive rule of law established by the New Jersey Supreme Court that state-of-the art is not an available defense to strict liability asbestos cases. The other parties in interest have consented in writing to the filing of this opposition brief by *amicus curiae.*

STATEMENT OF THE CASE

In *Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 447 A.2d 539 (1982), the New Jersey Supreme Court held that in a strict products liability action predicated on a failure-to-warn, the defendant is precluded from asserting "state-of-the-art" as an affirmative defense. Thus, such a defendant cannot contend that it neither knew nor could have known of the dangerous propensities of the product it manufactured and distributed at the time the product was placed into the stream of commerce. Knowledge of the dangerous propensities of the product is imputed to the defendant. If defendant's product caused plaintiff's injury, defendant's failure to warn plaintiff of these dangers results in its being held strictly liable for the injuries sustained by the plaintiff. *Beshada, supra,* was rendered in the context of an action by persons suffering from exposure to asbestos and asbestos-containing products.

Subsequently, in *Feldman v. Lederle Laboratories,* 97 N.J. 429, 497 A.2d 374 (1984), an action instituted against a prescription drug manufacturer for its failure to warn plaintiff of the dangerous properties of a certain drug, the New Jersey Supreme Court held that strict liability should be applied to prescription drug manufacturers. The Court, however, altered the imputation-of-

knowledge aspect of *Beshada* strict liability analysis in that it established a rebuttable presumption that the dangers of the products were knowable at the time of their manufacture and distribution, but that a defendant could offer evidence refuting the presumption. The court explicitly endorsed and reaffirmed the strict liability absolute imputation-of-knowledge standard established by *Beshada* for cases involving the "circumstances giving rise to [the *Beshada*] holding." 97 N.J. at 455, 479 A.2d at 388.

Shortly thereafter, in *In the Matter of Asbestos Litigation Venued in Middlesex County,* 99 N.J. 201, 491 A.2d 700 (1984), the New Jersey Supreme Court affirmed a denial of petitioner Owens-Illinois' motion, in light of *Feldman, supra*, to introduce state-of-the-art evidence in an asbestos case. That denial recognized *Beshada* as controlling in asbestos cases and further enunciated the distinction between typical and atypical product liability cases, *Feldman* representing the former and *Beshada*, as stated in Feldman, representing the latter. The Supreme Court further elucidated its holding in *Feldman* by recognizing "that *Beshada* [citation omitted] applies to all pending asbestos cases." *Id.*

While the New Jersey Supreme Court has not explicitly ruled that the state-of-the-art defense is unavailable in other toxic exposure cases similar to asbestos (where injury from exposure to a product typically incubates over a latency period of many years), lower court decisions subsequent to *Feldman* support that position. It is entirely possible that the New Jersey Supreme Court may, in the future, hold that the state-of-the-art defense is unavailable in other toxic exposure cases like asbestos for the same policy reasons that the court has so held in reference to asbestos cases.

The New Jersey Supreme Court has recently again upheld the decision in *Beshada* and endorsed the absolute imputation-

of-knowledge rule for strict liability failure-to-warn cases involving asbestos-related diseases. *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 656, 512 A.2d 466 (1986). In *Fischer*, the court reiterated the policies supporting the application of the *Beshada* strict liability rule.

It is significant that in *Fischer* the court held that it was properly found below that the defendant had actual knowledge of the hazards of asbestos to workers as early as the 1930's and refrained from issuing warnings to users of the product. This, it was held, made it appropriate for the plaintiff to assert a claim for punitive as well as compensatory damages.

The instant matter commenced with a number of asbestos cases pending in the United States District Court for the District of New Jersey wherein various defendants sought an *in limine* ruling by the court that the denial of the state-of-the-art defense in asbestos cases, given the alleged availability of this defense in other kinds of strict liability cases, constituted a denial of equal protection. The District Court assembled *en banc* and held by an 8-6 majority that equal protection was not violated. *In re Asbestos Litigation*, 628 F. Supp. 774 (D.N.J. 1986). That judgment was affirmed by a 2-1 decision of the United States Court of Appeals. *In re Asbestos Litigation*, 829 F.2d 1233 (3d Cir. 1987).

SUMMARY OF ARGUMENT

The question as to whether New Jersey's distinction as to the availability of the state-of-the-art defense between asbestos cases and non-asbestos cases asserting strict liability in tort for unwarned defective products violates equal protection requires application of the "rational basis" test. Among varied articulations of that test, a recent formulation would uphold a lawmaker's classification "unless the varying treatment of different groups

or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance v. Bradley,* 440 U.S. 93, 96 (1979). The distinction presently drawn in New Jersey between the nature of hazards arising from the asbestos industry and harms to be anticipated from defective products generally can rationally justify allowing the state-of-the-art defense as to the former and denying it as to the latter for any of several reasons. Among these are: (1) actual industry knowledge of asbestos hazards going back to the 1930's; (2) the long incubation period of asbestos injury; (3) the great complexity of asbestos cases in respect of proximate cause and allocation of fault among multiple suppliers; (4) extraordinary size of the asbestos personal injury litigation; (5) expedition of litigation and greater assurance of compensation for asbestos victims.

The majority in the Court of Appeals soundly held that the foregoing factors, or some of them, were "legislative facts" legitimately influencing the determination of pertinent principles of substantive law by the New Jersey Supreme Court. The accreditation by the Court of Appeals to the New Jersey Supreme Court of the making or recognition of such legislative facts, explicit or implied, free from any right of interested parties to contest those facts by a trial-type procedure, was entirely appropriate in relation to the declaration of substantive law, whether by a legislature or the highest court of a state. This process does not involve rules of judicial notice applicable solely to the finding of adjudicative facts, as required in federal fact trials by Federal Evidence Rule 201. In view of the foregoing, this case does not present an instance of conflict between the Third and Fifth Circuits, as argued by petitioner.

Petitioner relies upon *Hardy v. Johns-Manville Sales Corp.,* 681 F.2d 334 (5 Cir. 1982) as the claimed instance of conflict with the decision of the Third Circuit in the present case. There

is no conflict. The *Hardy* case was simply a holding that the District Court had erred in applying offensive collateral estoppel against defendants in an asbestos case on the basis of a trial finding in a previously tried asbestos case involving other defendants than those sought to be precluded by the District Court in the *Hardy* case. The Fifth Circuit in the *Hardy* case was not at all concerned with the propriety of the use of legislative facts by a court in determining a substantive rule of law. In the instant case, by contrast, there had not yet even been any trial of the factual issues. There had therefore been no occasion to make determinations of adjudicative fact. The majority of the Third Circuit held only that the differentiation made by the New Jersey Supreme Court was sufficiently supported by legislative facts which the New Jersey court either had or could have taken into account in making its determination to render the distinction rational.

There is no appropriate basis for the issuance by this Court of a writ of certiorari on the present application.

ARGUMENT

I.

THE LAW DECLARED BY THE NEW JERSEY SUPREME COURT IS RATIONALLY RELATED TO LEGITIMATE GOVERNMENTAL INTERESTS AND DOES NOT DENY EQUAL PROTECTION OF THE LAW TO ANY DEFENDANTS.

The issue as to whether the New Jersey common law rule distinguishing between typical and atypical cases (the latter including asbestos cases), for the availability of the state-of-the-art defense in strict tort liability actions, violates equal protection, requires an analysis so as to determine whether the distinction is rationally related to a legitimate government interest. The "rational basis" analysis, which the petitioners acknowledge is the proper test (Pet. 19), is applied here because the right of a defendant to invoke the state-of-the-art defense, "is. not fundamental under the Constitution nor is it a suspect classification." *In re Asbestos Litigation, supra,* (829 F.2d 1238) (citations omitted).

In *Vance v. Bradley,* 440 U.S. 93, 97 (1979), the Supreme Court detailed the analysis required under this unobtrusive standard:

> [C]ourts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws. The Constitution presumes that, absent some reasons to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial inter vention is generally unwarranted no matter how unwisely we may think

> a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups of persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational. (Footnotes omitted.)

The application of the rational basis test has never turned on the status of the state entity promulgating the challenged classification. Thus, state supreme court determinations of law are to be given the same, if not greater, deference as any other state law-making entity in the application of the rational basis analysis. *See Edwards v. Habib*, 397 F.2d 687, 691, 695 (D.C. Cir. 1968), *cert denied*, 393 U.S. 1016 (1969). Accordingly, the District Court below held "[e]qual (if not greater) caution should be exercised in assessing whether decisions of a state Supreme Court have denied equal protection of the laws." *In re Asbestos Litigation, supra,* (628 F.Supp. at 777). The Court of Appeals properly observed that the dissenting opinion in the District Court below was grounded in "the wisdom and correctness of *Beshada* and its progeny, an appraisal not within the function of the federal courts when called upon to assess equal protection attacks on state law." *In re Asbestos Litigation, supra,* (829 F.2d at 1242). In other words, any review is properly limited to the issue of whether the New Jersey Supreme Court acted irrationally in the distinction it has drawn, not whether a particular ruling is a wise or abstractly just exposition of the common law of New Jersey. Further, the existence of a means to correct "any imprudent state court common law precedent" (*id.* at 1240) is further augur for the exercise of restraint by the reviewing court. The Court of Appeals noted that a decision of the New Jersey Supreme Court is subject to legislative scrutiny, and that its ruling "is susceptible

to prompt and uncomplicated reversal by the state legislature if it deems fit." *Id.* at 1240.[1]

It is submitted that any or all of the five factors listed above in the Summary of Argument as potentially influential legislative facts, actually or inferentially justifying to the New Jersey Supreme Court its classifications of strict liability actions here attacked by petitioner, would in fact and in law justify the classification as against equal protection assault. In particular, we emphasize the first listed of those factors, and strongly relied on in Judge Becker's opinion in the Third Circuit, as stated by him:

> That the New Jersey Court *** has determined a legislative fact — that at all relevant times,

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1. No such legislative action has been passed altering the ruling in *Beshada*, in spite of the legislature's obvious awareness of its existence and import. In point of fact, the New Jersey State Judiciary Committee rejected a bill that would have effectively overruled *Beshada*. In the legislative statement accompanying Senate Bill No. 1465 entitled "An Act Concerning the State of the Art Defense in Certain Product Liability Actions," the intent to overrule *Beshada* is explicitly stated:

> *This Bill is intended merely to restore the availability of the "state of the art" defense and the related proof requirements in product litigation to their pre-Beshada status.* Under this Bill, if the trier or fact finds that at the time of manufacture or sale of a product, the danger which caused the harm was not known by this manufacturer or seller given the knowledge then available and the scientific, technical or medical community, the product's manufacturer or seller will not be liable for harm caused by the product or for failure to provide warnings or instructions about the unknowable danger. (Emphasis added).

This bill was terminated at the committee level and has never been reintroduced. Nonetheless, its limited vitality does serve to establish that the New Jersey Legislature did, in fact, utilize the "democratic process" in upholding the action of the New Jersey Supreme Court.

asbestos claims were knowable to the industry" (Pet. App. 38a).

We submit, as concluded by Judge Becker, that the New Jersey Supreme Court has reasonably decided to preclude endless relitigation of what that court regarded as "knowable" to the asbestos industry. (*Ibid.* 39a).

Distinctions made as between classes of litigants have consistently been upheld as constitutional. Examples include distinctions made under the New Jersey Tort Claims Act, workers' compensation statutes and medical malpractice claimants, all of which are the product of legitimate legislative decisions. *Gogol v. Johns-Manville Sales Corp.*, 595 F. Supp. 971, 974-75 (1984); *In re Asbestos Litigation, supra,* (829 F.2d at 1239). That the subject ruling, and the distinction contained therein, as between litigants in typical and atypical (including asbestos) actions, is rationally related to a legitimate state interest is patent. The very nature of asbestos litigation justifies differential treatment. Such is illustrated by the sheer magnitude of claimants and multiple named defendants, complicated by the incubation period of asbestos related injuries over a latency period of many years. *Fischer v. Johns-Manville, supra,* (103 N.J. at 660, 663-64, 512 A.2d at 475-76). These factors in conjunction with the traditional "strict liability" goals of compensating victims and fairly spreading risk serve as one of several rational bases for the disallowance of the state-of-the-art defense in asbestos cases. The *Beshada* ruling served to simplify the trial of these matters with regard to potentially complex and conflicting testimony relative to knowledge possessed by the industry as a whole or by a particular member at various remote dates. By presuming the knowledge or at least knowability of the risks of asbestos exposure to manufacturers and distributors of asbestos products, the *Beshada* rule effectuates goals of case management by expediting the liability phase of trial

and at the same time insures victim compensation.[2] Further, as noted by the Court of Appeals, an asbestos defendant has not been deprived of its due process right to be heard as *Beshada* denies it but one questionable probable defense.[3] This denial is the product of a steady evolution of New Jersey's law relative to the doctrine of strict products liability. The latter serves as an additional reason not to disturb what has gradually evolved into the common law, on a case-by-case basis. The *Beshada* rule is such a product, derived from considerations of public policy unique to asbestos cases. The manner in which the rule addresses the unusual circumstances of asbestos claims, by eliminating jury confusion and the resulting prejudice to litigants, as well as its expediting of the trial of viable issues is characteristic of areas in which a state Supreme Court has traditionally been acknowledged as playing a leading role. *In re Asbestos Litigation, supra,* (628 F.Supp. at 779). In this context, such decisions are the product of considerations of public policy and have been likened to legislative action. *Id.* In fact, the majority in the Court

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2. That the need to insure equitable recovery for asbestos victims is real is illustrated by recent legislation codifying and clarifying rules regarding the imposition of liability and the award of punitive damages in products liability actions. New Jersey Products Liability Act of 1987, N.J. Stat. Ann. Section 2A:58C-1—2A:58C-7 (West 1987). Environmental tort actions, including asbestos cases, where the harm arises from exposure to a toxic substance, are exempted from this act. This further serves to illustrate the need for specific treatment of asbestos litigation as well as the fact that the legislature recognizes that *Beshada* addresses environmental or atypical tort actions.

3. The petitioners' contention that *Fischer* has undermined *Beshada* is without merit as illustrated by the District Court's recent ruling on petitioner's application for severance of the punitive facet of damages from the compensatory claim in the case of *Campolongo v. Celotex Corporation,* No. 82-2953 (D.N.J. March 1, 1988). The court combined the principles of *Beshada* with the New Jersey doctrine of concurrent cause to allow for a compensatory damage trial which was greatly streamlined and simplified by the precluding of the introduction of conduct-related proofs by any party.

of Appeals soundly held that the varied factors considered (characterized as social, economic and administrative in nature) were legislative facts influencing the determination of principles of law. The accreditation by the Court of Appeals to the New Jersey Supreme Court, as regards the making or recognition of such legislative facts, free from the right of interested parties to contest those facts by any formal procedure, was entirely appropriate. Shifts in state tort policy as evidenced in the substantive law, in response to such as the aforesaid factors, may be accomplished by judicial action as well as legislation. The Circuit Court further notes that given the prime consideration of case management, as noted in *Beshada*, "the expertise of a court substantially outweighs that of a legislature and deserves due deference." (Pet. App. 27a).

II.

THE OPINIONS OF THE THIRD CIRCUIT DO NOT PRECLUDE EVIDENCE IN DENIAL OF DUE PROCESS NOR IN APPLYING FEDERAL EVIDENCE RULE 201. THE LATTER ADDRESSES ADJUDICATIVE AND NOT LEGISLATIVE FACTS.

Petitioner's first reason for granting the writ is that the Third Circuit has precluded evidence from defendants in products liability cases, thereby depriving petitioner of due process rights. This is fundamentally mistaken. The Third Circuit has simply upheld the validity of New Jersey's substantive tort law which precludes the state-of-the-art defense in asbestos cases. That is obviously not the equivalent of approval of preclusion of material evidence pertinent to an issue of fact under a given rule of substantive law.

Petitioner premises its argument on the basis that the Third Circuit has sanctioned the New Jersey Supreme Court's resolution of the substantive law of New Jersey on findings of fact in other

lawsuits that the dangers of asbestos were knowable to the asbestos industry as early as the 1930's and 1940's, thereby in effect according preclusive collateral estoppel significance to those decisions. Petitioner purports to rely on decisions of this Court in the issue preclusion context as having a constitutional basis. *See Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313 (1971) and other cases cited (Pet. 11).

In the first place, the issue of collateral estoppel preclusion is totally foreign to the instant case. The New Jersey Supreme Court cases creating the distinction between asbestos and other strict liability tort cases here under attack in nowise implicated questions of issue preclusion in a trial context. The reliance by the New Jersey courts on other judicial opinions concerning the widespread industry knowability of the dangers of asbestos many years ago was not for the purpose of making or approving trial adjudications of such knowability, but only as sources of legislative facts to which the court might properly resort for purposes of pronouncing the existence of a substantive rule of tort law. Consequently, petitioner, whose instant litigation has not yet even come to trial, was not deprived of any "full and fair" opportunity to contest such legislative facts. The parties in the cases decided by the New Jersey Supreme Court were on presumptive notice that the Supreme Court might look to any reasonably reliable source of legislative facts in passing upon the question of law as to whether defendants in asbestos cases, as distinguished from typical strict liability tort cases, should be entitled to the defense of state-of-the-art.

In any event, an examination of the decisions of this Court involving issue preclusion by collateral estoppel cited in the Petition (Pet. 11) will show that none of them upheld a constitutional defense to the use by a plaintiff of offensive collateral estoppel.

The foregoing serves also to summarily answer the third

reason urged by petitioner for granting the writ (Pet. 22-23).

In its fourth reason for granting the writ, the petitioner asserts the unconstitutionality of the Third Circuit's alleged "failure to apply the minimal due process requirements of Federal Rule of Evidence 201" (Pet. 23, *et seq.*). This entire argument, however, founders on the misassumption that the New Jersey Supreme Court was taking "judicial notice" of adjudicative facts in establishing the legal distinctions here under attack, and that the Third Circuit therefore was subject to the limitations concerning judicial notice of "adjudicative facts" in Federal Evidence Rule 201 in upholding the action of the New Jersey Court. However, the New Jersey Supreme Court was doing no such thing. It was merely making *legislative* findings of fact of the same kind as legislative bodies do when enacting substantive legislation. The New Jersey Supreme Court was neither making, nor approving the making of adjudicative facts by a lower court in a particular litigated trial, when it inferentially found, for example, that knowability of the hazards of asbestos was a fact in the asbestos industry for many decades past. That legislative finding, along with others mentioned above, was for purposes of declaring a substantive rule of law, not of deciding factual trial disputes between particular parties litigant, where observance of Federal Rule of Evidence 201 (or similar rules concerning judicial notice in New Jersey) are required to be adhered to. The distinction between legislative facts and adjudicative facts in the present connection is well-developed in the notes of the Advisory Committee to the Federal Rules of Evidence 201, as outlined in the concurring opinion for the Third Circuit majority by Judge Becker below (Pet. App. 45a, *et seq.*). Petitioner's argument in this regard is based upon fundamental misapprehension of basic principle in respect of law-making as distinguished from fact adjudication in respect of the rights and liabilities of a particular litigating party.

III.

THERE IS NO CONFLICT BETWEEN THE THIRD CIRCUIT AND EITHER THE FIFTH CIRCUIT OR THIS COURT.

As already developed hereinabove, the upholding by the Third Circuit of the constitutionality of the New Jersey Supreme Court's denial of a state-of-the-art defense in asbestos cases does not implicate any dispute or conflict with decisions of this Court in the area either of issue preclusion by collateral estoppel or in any other respect.

It remains to address the contention in the petition that there is a conflict between the present decision of the Third Circuit and the decision of the Fifth Circuit in *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5 Cir. 1982). The alleged conflict is said to consist of the fact that the Fifth Circuit in the *Hardy* case held that issue preclusion by collateral estoppel was improperly applied in that case against an asbestos defendant by the District Court on the basis of a previous decision of the Fifth Circuit in *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5 Cir. 1973), concerning other defendants, whereas the Third Circuit allegedly sanctioned what in effect was collateral estoppel use by the New Jersey Supreme Court of the same *Borel* case in concluding that industry knowledge of the hazards of asbestos was widespread in the asbestos industry in the 1930's and the 1940's. The response to this argument can be surmised from what we have already stated hereinabove. None of the decisions of the New Jersey Supreme Court in finding, legislatively, either expressly or impliedly, that knowledge of the hazards of asbestos was knowable to all defendants manufacturing asbestos in the 1930's and 1940's constituted instances of application against a specific litigant (much less against this petitioner) of a rule of issue preclusion. Nor did the Third Circuit consider the actions of the

New Jersey Supreme Court as justified on that basis.

Consequently, there is no issue presented as to conflict between the Third and Fifth Circuits in any respect.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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